



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

*See 1969 Amendment
to act 7146 V.C.S.*

August 19, 1959

Honorable Joe Resweber
County Attorney
Harris County Courthouse
Houston 2, Texas

Opinion No. WW- 691

Re: Severability of improve-
ments from land and classifi-
cation thereof as realty
or personalty for tax pur-
poses.

Dear Mr. Resweber:

We quote from your opinion request as follows:

"On March 1st, 1957 this office, at the request of Mr. Carl S. Smith, Tax Assessor and Collector of Harris County, rendered an opinion regarding the severability of improvements erected by a lessee on land owned by another party, but under lease to said lessee, and the classification of such improvements as realty or personalty.

"It is the feeling of this writer that the provisions of Article 7146, V.C.S., are very clear and definite as to what is real property for the purpose of taxation. It is our further feeling that the effects of this Statute cannot be varied by contracts or agreements to the contrary between private parties. <

"On March 34d, 1943 your Office rendered its Opinion No. O-5059 regarding a similar situation where improvements had been erected by the vendee under a contract for deed. In this opinion views similar to ours were expressed. However, with the great number of leases currently in existence in Harris County providing that the improvements shall remain the property of the Lessee and that the Lessee shall have the right to remove such at the termination of the lease, (with taxes becoming delinquent on many of such improvements), Mr. Smith feels that an Opinion should be requested from your Office."

Article 7146, Vernon's Annotated Civil Statutes, provides that:

"Real property for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in anywise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same. Id."

The early case of W. J. Hutchins v. Masterson and Street, 46 Tex. 551, 26 Am. Rep. 286 (1887), established three criteria for determining whether improvements should be classed as real or personal property: (1) there must be a real or constructive annexation of the article in question to the realty; (2) the article must be adapted to the uses or purposes of the realty to which it is connected; (3) the party making the annexation must intend that the improvement become a permanent accession to the freehold. Of the three tests, pre-eminence is given the question of intention. See Maro Company v. State, 168 S.W.2d 510 (Tex.Civ.App., 1943, error refused). However, the rules of common law which govern the right of private persons to fixtures are not necessarily controlling in the field of taxation. This question turns primarily upon the intention of the Legislature as expressed in the tax statutes and construed by the courts. 154 A.L.R. 1309, 1311.

The A.L.R. Annotation cited above discusses the varying treatment of this problem by different jurisdictions. Certain jurisdictions hold that the improvements are part of the realty and as such are taxable to the lessor. Other jurisdictions hold that the improvements may be severed for the purpose of taxation but are taxable to the lessee as realty. A third school of thought taxes the improvements to the lessee as personalty. Texas falls within the third group.

The case of Maro Company v. State, supra, held that casings, rods, tubing, pumps and tanks which the lessee was entitled to remove from the leasehold were personal property for the purpose of taxation. In reaching its conclusion, the court stated:

"Appellee tries to make a distinction between the rule making accessories or appliances such as these a part of the realty for taxable purposes and any other rules governing the question of whether such appliances or accessories are personal property or a part of the realty. After

making an exhaustive research we have failed to find any distinction or any difference in the rules applicable in such cases."

To the same effect is Shugart v. Nocona Independent School District, 288 S.W.2d 243 (Tex.Civ.App., 1956).

The case of Armstrong v. Mission Independent School District, 195 S.W. 895 (Tex.Civ.App. 1917) specifically stated that certain buildings constituting a cotton mill located on the property of a lessor were personal property and not real estate because "it [the mill] consisted of improvements placed upon the land of a railroad company by a lessee with an agreement that it was for the use of the lessee and with the further agreement that it could be removed." This case was reversed in Mission v. Armstrong, 222 S.W. 201 (Tex.Com.App. 1920, opinion approved), but only upon the point of whether or not the school district had a lien for taxes upon the personal property in question.

For further support of the proposition that Texas regards the general principles of the law of fixtures as controlling the determination of whether property is real or personal for the purposes of taxation, see the case of 900 Main, Inc. v. City of Houston, 150 S.W.2d 468 (Tex.Civ. App. 1941, Dism.Judg.Cor.), in which it was held that an air conditioning system was realty for the purpose of taxation; the court rested its decision on the general law of fixtures and in particular upon the intention of the parties as evidenced by the contract between the lessor and lessee.

In view of the foregoing authorities, you are respectfully advised that improvements placed upon demised premises by the lessee which remain the property of the lessee and which may be removed at the termination of the lease are personal property for the purpose of taxation.

SUMMARY

Improvements placed upon leased land by a lessee which remain the property of the lessee and which may be removed at the termination of the lease are severable for the purpose

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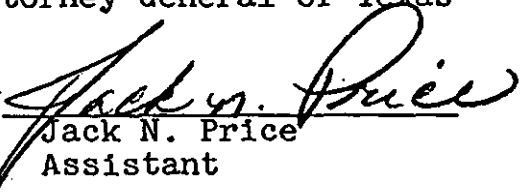
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of taxation and are classified as personalty.

Yours very truly,

WILL WILSON
Attorney General of Texas

By


Jack N. Price
Assistant

JNP:cm

APPROVED:

OPINION COMMITTEE:
Geo. P. Blackburn, Chairman

C. K. Richards
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REVIEWED FOR THE ATTORNEY GENERAL
By: W. V. GEPPERT